

THE HONOURABLE SRI JUSTICE SANJAY KUMAR
AND
THE HONOURABLE SRI JUSTICE K.LAKSHMAN

WRIT PETITION NO.18590 OF 2017

ORDER

(Per Sri Justice Sanjay Kumar)

1. Challenge in this writ petition is to the Order-in-Original dated 30.01.2017 passed by the Commissioner of Service Tax, Service Tax Commissionerate, Hyderabad, the second respondent, whereby the petitioner was mulcted with tax and penalty for irregular availment of CENVAT Credit.

2. On 12.06.2017, being the first hearing of this case on admission, Sri M.V.J.K.Kumar, learned counsel for the Revenue, undertook that no coercive measures would be initiated pursuant to the impugned order.

3. The petitioner is an advertisement booking agency. It books advertising space in print and electronic media for its clients. It is assessed to service tax in this regard. Show-cause notice dated 19.04.2016 was issued to the petitioner by the office of the Commissioner of Central Excise & Service Tax, Audit Commissionerate, Hyderabad, in relation to the tax period 01.10.2010 to 31.03.2015 alleging that it had irregularly availed CENVAT Credit on certain ineligible services. The petitioner submitted reply dated 16.05.2016 in response thereto. However, by way of the impugned Order-in-Original dated 30.01.2017, the second respondent held against the petitioner and imposed tax and penalty upon it. Aggrieved thereby, the petitioner is before this Court.

4. We may note at this stage that though the petitioner is provided with the alternative remedy of a statutory appeal under Section 86 of the Finance Act, 1994, it chose to approach this Court directly by way of this writ petition on the ground that the impugned Order-in-Original reflects total

non-application of mind. This aspect of the matter, which has also been adverted to by the Revenue, shall be dealt with hereinafter.

5. Heard Sri S.Ravi, learned senior counsel representing Sri Ch.Pushyam Kiran, learned counsel for the petitioner, and Sri A.Radha Krishna, learned senior standing counsel for the Revenue.

6. At the outset, we may note that the CENVAT Credit availed by the petitioner during the relevant tax period was to the tune of Rs.1,41,51,903/-. This included input tax credit availed upon output services which were subject to service tax and also some output services which were exempt therefrom. Be it noted that output services relating to advertising space booked by the petitioner in print media is exempted under Section 65(105)(zzzm) of the Finance Act, 1994, which defines 'taxable service' to mean any service provided to any person by any other person, in relation to sale of space or time for advertisement but does not include sale of space or advertisement in print media. The CENVAT Credit availed by the petitioner which is in controversy accounts for a sum of Rs.17,15,489/- only.

7. Rule 6 of the CENVAT Credit Rules, 2004 deals with the obligations of a provider of taxable and exempted services. Rule 6(1) states that CENVAT Credit shall not be allowed on inputs/input services exclusively used for providing exempted services. Rule 6(2) provides that if inputs or input services are used for provision of output services which are chargeable to duty or tax as well as exempted services, then separate accounts are to be maintained for receipt, consumption and inventory of inputs and receipt and use of input services and the provider shall take credit only on inputs used for dutiable output services. Rule 6(3) of the CENVAT Credit Rules, 2004 is relevant for the purpose of this case and states to the effect that a provider of output services who opts not to maintain separate accounts, as required

under Rule 6(2), should follow any one of the options provided under Clauses (i) to (iii) thereunder, as applicable to him. Clause (i) provides for the option of paying an amount equal to 5% of the value of the exempted services. Pursuant to Notification No.18/2012 dated 17.03.2012, the amount to be paid under Clause (i) was increased to 6% with effect from 01.04.2012.

8. It is an admitted fact that the petitioner did not maintain separate accounts of the inputs/input services utilized for providing certain taxable and exempted output services. It also did not choose to opt for one of the procedures stipulated in Rule 6(3) set out *supra*. The petitioner however availed and utilised CENVAT Credit on such inputs/input services which were common to both taxable and exempted output services and the same amounted to Rs.17,15,489/-.

9. It may be noted that there is no controversy with regard to the entitlement of the petitioner to avail CENVAT Credit but for this disputed amount of Rs.17,15,489/- out of the total extent of Rs.1,41,51,903/-. While so, the second respondent issued show-cause notice dated 19.04.2016 to the petitioner proposing to choose the option under the aforesaid Rule 6(3)(i) on its behalf and calling upon it to explain as to why it should not be directed to pay an amount of 5%, upto 31.03.2012, and 6%, from 01.04.2012, of the value of the exempted services, aggregating to Rs.3,52,65,241/-. In its reply dated 16.05.2016, the petitioner contended that it was wholly unreasonable on the part of the authorities to expect it to pay over Rs.3.50 Crore when the total CENVAT Credit availed by it was less than Rs.1.50 Crore and the actual dispute boiled down to a mere Rs.17,15,489/-. It relied on case law to support its contention that such an unreasonable result could not be allowed to follow by application of the law.

The impugned Order-in-Original however reflects that the second respondent did not even advert to the case law cited before him.

10. Another issue that was raised by the second respondent in the show-cause notice was with regard to certain debit notes produced by the petitioner not being valid invoices for the purpose of availing CENVAT Credit. In response to this, the petitioner contended that debit notes were valid documents for availing such credit, by relying upon Rule 9(2) of the CENVAT Credit Rules, 2004. It also pointed out that this issue had fallen for consideration before the Mumbai Bench of the Customs, Excise and Service Tax Appellate Tribunal in MAHANAGAR GAS LTD. V/ s. CCE¹, wherein it was held that a debit note would be on par with the documents mentioned in Rule 9(1) of the CENVAT Credit Rules, 2004. Reliance was also placed on CCE, INDORE V/ s. GRASIM INDUSTRIES LTD.², a decision of the Delhi Bench of the Tribunal, which also held to this effect. Various other decisions were also cited in this regard. However, the second respondent did not choose to advert to any of these decisions while holding against the petitioner on this aspect also.

11. In fact, no case law whatsoever finds mention in the impugned Order-in-Original. This reflects the level of application of mind by the second respondent. It is not open to an authority to ignore the binding precedents cited before it while interpreting and applying legal provisions. All the more so, when such misguided application of law by it leads to preposterous results, as in the case on hand. The petitioner who availed total CENVAT Credit of Rs.1,41,51,903/-, of which only a small sum of Rs.17,15,489/- falls within the realm of dispute, is now sought to be mulcted with exorbitant demands by the second respondent. Be it noted that the second respondent

¹ 2015-TIOL-1069

² 2011(24) STR 691

ultimately called upon the petitioner to pay Rs.3,52,65,241/- towards the CENVAT Credit irregularly availed by it, along with interest, apart from a penalty of Rs.3,52,65,241/-. The second respondent also confirmed the demand for a sum of Rs.12,75,645/- being the CENVAT Credit irregularly availed on the strength of debit notes along with a penalty for a like sum. A further penalty of Rs.10,000/- was also imposed for contravention of the provisions of the Finance Act, 1994.

12. The Assistant Commissioner of Central Tax, Central Excise & Service Tax, Secunderabad GST Commissionerate, filed a counter affidavit. Therein, he stated that the writ petition was not maintainable as a statutory appellate remedy was provided to the petitioner. He sought to justify exercise of power by the second respondent under Rule 6(3) of the CENVAT Credit Rules, 2004, on the ground that the petitioner had failed to furnish any information about the option exercised by it. He asserted that the petitioner had availed input tax credit irregularly by furnishing wrong information. This fact was stated to have come to the knowledge of the department only after verification of the petitioner's records.

13. Having considered the issue of maintainability of this writ petition, we are of the opinion that the petitioner cannot be non-suited on the ground of availability of an alternative remedy. The alternative remedy principle is not a straitjacket formula but a rule of convenience which has been evolved by Courts so as to ensure equitable distribution of work. It is therefore within the discretion of this Court to refuse to adopt the said rule in a deserving case. Presently, we find that the second respondent has brazenly exercised power under a provision which was not even available to him, as it was an enabling provision put in place for the benefit of the assessee, and arrived at a wholly unreasonable, if not absurd, result. That apart, the second

respondent did not even choose to deal with the binding case law cited before him while dealing with the issues arising for consideration. This arrogant and arbitrary approach adopted by the second respondent cannot be countenanced. It would therefore not be necessary for the petitioner to go through the motions of a statutory appeal to challenge the same. The contention of the respondents as to the maintainability of the writ petition is therefore rejected.

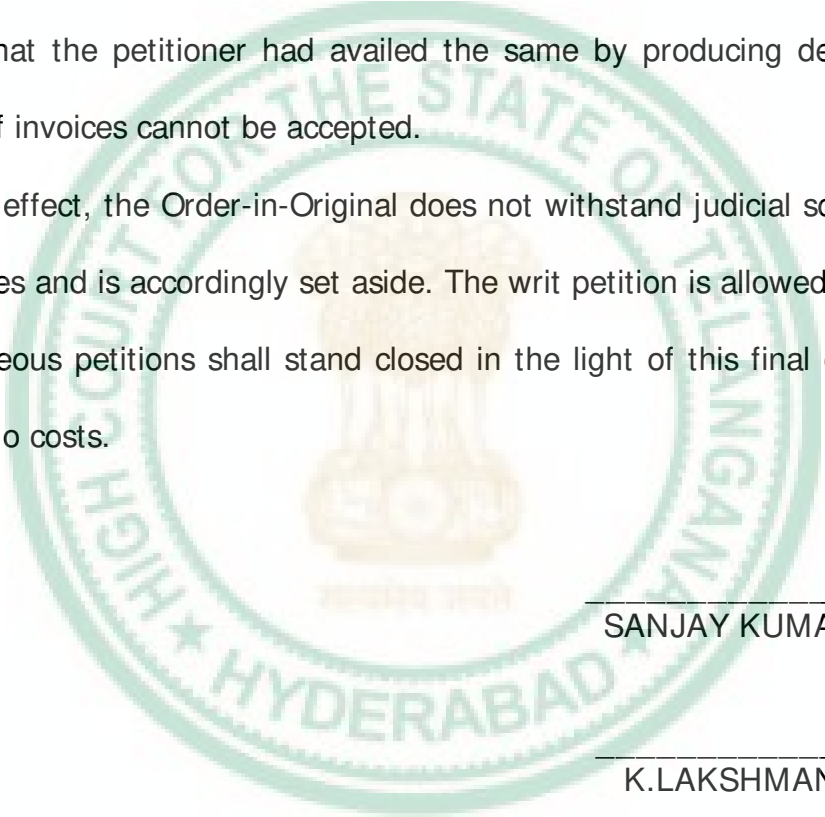
14. Further, we may reiterate that Rule 6(3) of the CENVAT Credit Rules, 2004, merely offers options to an output service provider who does not maintain separate accounts in relation to receipt, consumption and inventory of inputs/input services used for provision of output services which are chargeable to duty/tax as well as exempted services. If such options are not exercised by the service provider, the provision does not contemplate that the Service Tax authorities can choose one of the options on behalf of the service provider. As rightly pointed out by Sri S.Ravi, learned senior counsel, if the petitioner did not abide by the provisions of Rule 6(3) of the CENVAT Credit Rules, 2004, it was open to the authorities to reject its claim as regards the disputed CENVAT Credit of Rs.17,15,489/-.

15. We may also note that in the event the petitioner was found to have availed CENVAT Credit wrongly, Rule 14 of the CENVAT Credit Rules, 2004 empowered the authorities to recover such credit which had been taken or utilised wrongly along with interest. However, the second respondent did not choose to exercise power under this Rule but relied upon Rule 6(3)(i) and made the choice of the option thereunder for the petitioner, viz., to pay 5%/6% of the value of the exempted services. The statutory scheme did not vest the second respondent with the power of making such a choice on

behalf of the petitioner. The Order-in-Original, to the extent that it proceeded on these lines, therefore cannot be countenanced.

16. As regards the issue of debit notes, Sri A.Radha Krishna, learned senior standing counsel, is not in a position to dispute the case law relied upon by the petitioner in its reply dated 16.05.2016. It is not his case that any of these decisions was overturned or that there is a binding decision of a higher judicial authority to the contrary. He also has no explanation to offer as to why the second respondent did not even deal with the case law cited before him. We therefore hold that disallowance of CENVAT Credit on the ground that the petitioner had availed the same by producing debit notes instead of invoices cannot be accepted.

17. In effect, the Order-in-Original does not withstand judicial scrutiny on both issues and is accordingly set aside. The writ petition is allowed. Pending miscellaneous petitions shall stand closed in the light of this final order. No order as to costs.



SANJAY KUMAR, J

K.LAKSHMAN, J

27th September, 2019

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